that the answer to question (a) be in the negative. As regards question (b) I also concur that the answer should be in the negative for the reasons given by the learned the Lord President.

Hashim Yeop A. Sani S.C.J.: I have read the judgment of the learned Lord President and I agree that the answer to question (a) should be in the negative.

It seems to me the crux of the matter is does section 7 of the Law Reform (Marriage and Divorce) Act, 1976 extend the offence of bigamy under section 494 of the Penal Code to a second marriage contracted outside Malaysia? That could well have been the intention of the drafters of the Act but it is not clearly expressed. There is the definition "marriage with another woman" under section 2 of the Act to mean marriage of any person being married to any other woman during the life of the former wife "whether the second marriage has taken place within Malaysia or elsewhere". But unfortunately the expression "marriage with another woman" does not seem to appear in section 7 of the Act at all.

Section 4(1) of the Interpretation Act, 1967 provides for the grammatical variations, cognate expressions, gender and number of any word or expression appearing in a written law. The words "contract another union with any woman" appear however in section 6(2) of the Law Reform (Marriage and Divorce) Act, 1976 but that section deals with the right of succession or inheritance and not with penal liability. Therefore it cannot be said that the intention (if there was such an intention) of the legislature to cover a second marriage contracted outside Malaysia has been expressed clearly in the statute. An offence simply means an act or omission of such a description as would if committed within Malaysia be punishable under the law of Malaysia. What we have is a clear provision in the Penal Code that except for Chapter VI the other offences in the Penal Code are *not* extra-territorial offences.

I can only echo what was expressed very aptly by Lord Simonds in *London and North Eastern Ry. Co.* v. *Berriman*[8] where he said:

"A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court."

In construing penal provisions Lord Simonds referred to the remarks by Lord Esher M.R. in *Tuck & Sons* v. *Priester*:[9]

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

As regards question (b) since the sessions court is a creature of a statute its jurisdiction must be determined by the statute. This question has been dealt with extensively in both the judgments of the learned Lord President and the learned Chief Justice with which I agree and have nothing to add.

Abdoolcader S.C.J.: I agree with the judgment of the learned Chief Justice, Malaya.

Questions answered.

Solicitors: *Satchi & Co.*

JAMALI BIN ADNAN v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P, Seah & Hashim Yeop A. Sani S.C.JJ.) July 4, 5 & August 23, 1985]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 52 of 1984]

Criminal Law and Procedure – Plea of autrefois convict – Person convicted and sentenced in Sessions Court for robbery with deadly weapon subsequently charged in High Court for being in control without authority of deadly weapon and ammunition – Whether plea of autrefois convict available – Criminal Procedure Code (F.M.S. Cap. 6), ss. 166, 167 & 302 – Federal Constitution, art. 7(2).

Interpretation – "Same offence" – Federal Constitution, art. 7(2) – Interpretation Act, 1967, s. 59 – Criminal Procedure Code (F.M.S. Cap. 6), s. 302(i).

In this case the appellant had been convicted and sentenced in the Sessions Court on four charges of robbery with a deadly weapon *to wit* a revolver. Subsequently he was charged in the High Court for the offence of being in control, without authority, of the revolver and ammunition. The appellant was found guilty and sentenced to death (see [1985] 2 M.L.J. 392). A stay of execution was granted pending appeal to the Supreme Court. Before the hearing of the appeal, the appellant was allowed to adduce additional evidence about the trials, convictions and sentences for the armed robbery charges and to include the plea of *autrefois convict* as a ground of appeal. The question of law which arose was whether the appellant could lawfully be charged again in the High Court for offences constituted by the same acts under the Internal Security Act 1960 after he had been tried, convicted and sentenced by the Sessions Court for the robberies with a deadly weapon *to wit* a revolver under sections 392 and 397 of the Penal Code.

Held: (1) in order to operate as a bar the appellant must prove that the second prosecution or trial must be either (a) for the same offence or (b) on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might be convicted under section 167 of the Criminal Procedure Code;

(2) neither section 166 nor section 167 of the Criminal Procedure Code is applicable to the facts of the case, because there was no doubt at all as to the offences which the appellant had committed. In fact the appellant had no hesitation in pleading guilty to all the four charges of robberies with a deadly weapon when he appeared before the Sessions Court;

(3) the first limb of section 302 (i) did not apply in this case, as the appellant has not been charged with the "same offence" in the Sessions Court and the High Court;

(4) the charges for armed robbery under sections 392 and 397 of the Penal Code were triable in the Sessions Court but the Sessions Court was not competent to hear charges under the Internal Security Act, 1960 which carries the mandatory death penalty. It follows that when the appellant was charged under section 57 of the Internal Security Act 1960 the second time he could only be tried in the High Court. The plea of *autrefois convict* would therefore also fail by reason of section 302(iv) of the Criminal Procedure Code.

Cases referred to:

(1) *R.* v. *Miles* (1890) 24 Q.B.D. 423.
(2) *Connelly* v. *Director of Public Prosecutions* [1964] A.C. 1254.
(3) *R.* v. *Kupferberg* (1918) 13 Cr. App. R. 166, 168.
(4) *State of Bombay* v. *S.L. Apte* A.I.R. 1961 S.C. 578.
(5) *Manipur Administrator* v. *Bira Singh* A.I.R. 1965 S.C. 87.
(6) *Kharkan* v. *State of U.P.* A.I.R. 1965 S.C. 83, 86.

SUPREME COURT.

R.K. Menon (*Abbas Ismail* and *Hassan bin Tan Sri Ibrahim* with him) for the appellant.

Mohamed Noor Haji Ahmad (Deputy Public Prosecutor) (*Tan Hock Chuan* (Deputy Public Prosecutor) with him) for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court) : Following his arrest on October 19, 1981 the appellant led the police to two places where they recovered (a) 2 revolvers and (b) several rounds of ammunitions. As a result of police investigations and cautioned statements made by the appellant, he was separately charged for robberies with a deadly weapon, to wit a .38 revolver with named co-accused or co-accused on October 31, 1981 and November 1, 1981 respectively. The appellant pleaded guilty to all these four charges and the following sentences were passed by the President of the Sessions Court at Johor Bahru, *viz*:

(a)	As to Criminal : Trial No. A402/81	6 years' imprisonment and 3 strokes of the rotan;
(b)	As to Criminal : Trial No. A407/81	6 years' imprisonment and 2 strokes of the rotan;
(c)	As to Criminal : Trial No. A409/81 and	6 years' imprisonment and
(d)	As to Criminal : Trial No. A410/81	6 years' imprisonment.

It was ordered that all prison sentences are to run concurrently. The appellant did not appeal to the High Court against the sentences passed and we are informed by learned counsel for the appellant that sentences on whipping had been duly carried out.

While the appellant was still serving his prison sentence he was charged again on March 14, 1984 for offences under section 57 of the Internal Security Act 1960 for being in control, without lawful authority, of:

(i) 1 .38 Special revolver No. 32 and 4/1209 *and* 1 home-made .38 Special revolver under section 57(1)(a) and

(ii) 29 rounds of .38 Special ammunitions and 10 rounds of .38 ammunitions under section 57(a) (b) of the Internal Security Act 1960.

Since both these charges carry the death penalty learned counsel was assigned to defend the appellant at the trial. The appellant was found guilty by the High Court and was sentenced to death only on the first charge while sentence on the second charge was suspended pending the outcome of this appeal. A stay of execution was granted pending appeal to the Supreme Court after notice of appeal was filed by the appellant.

Before the hearing of the appeal we allowed an application by the appellant to adduce additional evidence about the trials, convictions and sentences relating to the four armed robbery charges which took place in the Sessions Court in 1981 in order to enable the defence to raise the plea of *autrefois convict* after the learned Deputy Public Prosecutor had intimated to the Court that he had no objection to the motion. We also allowed the Memorandum of Appeal to be amended so as to permit the appellant to include the plea of *autrefois convict* as a ground of appeal at the trial in the assigned to defend the appeal at the trial in the High Court stated that no instructions were given to him by the appellant about the trials, convictions and sentences in the Sessions Court at Johor Bahru

in 1981: nor was he aware of these when he was defending the appellant in the High Court. However, these matters came to light only after a new defence counsel had been assigned to argue the appeal of the appellant in the Supreme Court. As a matter of procedure, the plea of *autrefois convict* ought to be raised and determined before the commencement of the trial in the High Court (see section 303 of the CPC) but having regard to the special circumstances of this case and in the interest of justice, we allowed the plea to be raised and argued in the Supreme Court.

The question of law we have to determine is whether the appellant could lawfully be charged again on March 14, 1984 in the High Court for offences constituted by the same acts under the Internal Security Act 1960 after he had been tried, convicted and sentenced by the Sessions Court at Johor Bahru for four robberies with a deadly weapon, *to wit*, a revolver under sections 392 and 397 of the Penal Code in 1981.

It is a principle of the common law of England and in particular in the administration of criminal justice that "where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence" (*per* Charles J. in *R.* v. *Miles*[1]). This fundamental right is now guaranteed by Article 7(2) of the Federal Constitution which enacts that "A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted". This fundamental right is further elaborated by Parliament in section 59 of the Interpretation Act 1967 and section 302 of the Criminal Procedure Code (FMS Cap. 6). Both section 59 and section 302 are substantially the same as section 26 of the General Clauses Act 1897 and section 403 of the Criminal Procedure Code 1898 of India. However, the corresponding article of the Indian Constitution dealing with the subject is Article 20(2) which reads:

"No person shall be prosecuted and punished for the same offence more than once."

Although the wordings may be different, in our opinion, the same principle that a person shall not be placed in "double jeopardy" and be punished twice for the same offence applies. This appears to be based on the Latin maxim *Nemo debet bis vexari* – a man must not be put twice in peril for the same offence – and a plea of *autrefois acquit* or *autrefois convict* may be raised before the commencement of the second trial.

The foundation of the submission of learned counsel for the appellant is the important decision of the House of Lords in the case of *Connelly* v. *Director of Public Prosecutions*[2]. In that case the appellant C and three other men were charged on two indictments with murder and robbery with aggravation, arising out of an office robbery in November 1962 during which an employee was killed. In accordance with practice at the time, the indictment for murder was tried alone, C's defence being (a) alibi and (b) if present, no intent to murder. The jury returned a general verdict of guilty against all four men. At the conclusion of the trial the judge directed that the indictment for robbery should remain on the file marked "Not to be proceeded with without leave of this court or of the Court of Criminal Appeal". C appealed on some 15 grounds but the sole issue considered by the Court of Criminal Appeal was whether the evidence and the direction to the jury on the question whether or not C had been present at the scene of the crime were satisfactory. The court considered that on that issue the jury had been so misdirected that the conviction must be quashed and directed a verdict of acquittal to be entered, as required by section 4 of the Criminal Appeal Act 1907; but the Court thereafter granted leave to the Crown to proceed with the prosecution of C on the second indictment for robbery. The plea of *autrefois acquit* was raised and rejected and C was duly tried and convicted on the robbery indictment. On appeal to the Court of Criminal Appeal it was dismissed and on further appeal to the House of Lords it was held that the plea of *autrefois acquit* must be given a limited scope and that it was not a bar to C being tried afresh on the robbery charge.

After a full review of the authorities Lord Morris of Borth-y-Gest appears to lay down the following propositions:

(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

(4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

(5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charged; thus if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assaulted person later dies;

(6) that on a plea of *autrefois acquit* or *autrefois convict* a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(8) that, apart from circumstances under which there may be a plea of *autrefois acquit*, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of *res judicata* applies;

(9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime.

Neither learned counsel for the appellant nor the learned Deputy Public Prosecutor is able to find any decision of the Indian Supreme Court after 1964 adopting any of the propositions formulated by Lord Morris or following *Connelly case* (*supra*). This is not suprising because in our judgment, whether or not a plea of *autrefois acquit* or *autrefois convict* can succeed is to be governed by Article 7(2) of the Federal Constitution and the provisions of section 302 of the Malaysian CPC whereas in England it appears to be still based on the common law. For the purpose of this appeal we have to turn to Article 7(2) of the Federal Constitution and section 302 of the Malaysian CPC to find an answer to the solution of the appellant's submission.

The phrase "same offence" is used in Article 7(2) of the Federal Constitution, in section 59 of the Interpretation Act 1967 and in section 302(i) of the CPC. In *R.* v. *Kupferberg*[3] A.T. Lawrence J. said that "the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients . . . . ." This case was cited by Lord Morris in the *Connelly case* (*supra*) at page 1324. In the Indian Supreme Court the expression "same offence" has been interpreted to mean "an offence whose ingredients are the same" (see *State of Bombay* v. *S.L. Apte*[4] and *Manipur Administration* v. *Bira Singh*[5]). We agree and accept this construction by the Indian Supreme Court and would adopt it in construing the phrase "same offence" in the administration of criminal justice in this country.

In order to operate as a bar the appellant must prove that the second prosecution or trial must be either (a) for the same offence or (b) on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167 of the CPC (see section 302(i) of the CPC). Now, sections 166 and 167 read:

> 166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences

> 167. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

In our opinion, section 166 provides for a situation where it is doubtful what offence has been committed. When a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, that section permits that the accused may be charged with having committed all or any of such offences and any number of such charges in the alternative or with having committed some one of such offences. Section 167, on the other hand, enables the trial court to convict an accused charged with one offence for a different offence where the facts show that a different offence has been committed (see *Kharkan* v. *State of U.P.*[6]).

In our judgment, neither of these provisions

is applicable to the facts of this case because here, there was no doubt at all as to the offences which the appellant had committed over a period of time with different accomplice or accomplices and on various victims. In fact, the appellant had no hesitation in pleading guilty to all the four charges of robberies with a deadly weapon when he appeared before the Sessions Court at Johor Bahru.

Nor did the first limb of section 302(i) of the CPC, in our opinion, apply inasmuch as the appellant has not been charged with the "same offence" in the Sessions Court and the High Court. In the Sessions Court the appellant was charged with robberies with a deadly weapon, *to wit*, a revolver under section 392 and punishable under section 397 of the Penal Code. Whereas in the High Court the charges were under the Internal Security Act 1960. A comparison of these charges would indicate that the essential ingredients are not the same as armed robbery can be regarded as an aggravated form of theft causing fear of instant death or hurt on the intended victim voluntarily by means of a deadly weapon. On the other hand, the essential ingredients under the Internal Security Act 1960 are simply control of firearms and/or ammunitions without lawful authority. Since learned counsel for the appellant is unable to bring his case within the first limb of section 302(i) of the CPC the main ground of appeal therefore fails.

It cannot be disputed that charges under sections 392 and 397 of the Penal Code are triable in the Sessions Court and that the court is not competent to hear charges under section 57 of the Internal Security Act 1960 which carries the mandatory death penalty. Only the High Court can pass such a sentence in law. It follows that when the appellant was charged under section 57 of the Internal Security Act 1960 the second time he can only be tried in the High Court. It seems that the plea of *autrefois convict* would also fail by reason of section 302(iv) of the CPC. But it is pertinent to note that this sub-paragraph confers a discretion on the Public Prosecutor to charge the appellant on any other offence or offences constituted by the same acts which he might have committed, and we have not heard any submission by learned counsel for the appellant that this discretionary power had been wrongly or improperly exercised. In fact, no ground of appeal had been raised challenging the exercise of this discretion by the Public Prosecutor. Now, sub-paragraph (iv) of section 302 of the CPC reads:

"A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he was subsequently charged."

Having disposed of the plea of *autrefois convict* which, in our judgment, did not apply to the facts of this case, we turn to deal with the other grounds based on the merits of the appeal.

Order accordingly.

Solicitors: *Jalil, Hassan & Partners.*

LYE THAI SANG & ANOR. v. FABER MERLIN (M) SDN. BHD. & ORS.

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah S.C.JJ.) July 2 & August 30, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal Nos. 79 & 90 of 1984]

Practice and Procedure – Appeal heard and disposed of by Supreme Court – Whether Supreme Court has power to review earlier decision – Rules of Supreme Court, 1980, r. 70 – Courts of Judicature Act, 1964, ss. 41, 42, 44, 67 & 69 – Federal Constitution, art. 128(3).

Constitutional Law – Supreme Court – Jurisdiction of – Whether Supreme Court has power to review earlier decision – Federal Constitution, art. 128.

In this case the applicants applied by motion for an order or orders that the judgment of the Supreme Court in the Civil Appeals, in which they were respondents, be reviewed. The judgment of the Supreme Court is reported at [1985] 2 M.L.J. 380.

Held: where an appeal has been heard and disposed of by the Supreme Court, the Supreme Court has no power to review the case, that is, to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by section 49 of the Courts of Judicature Act 1964.

SUPREME COURT.

Humfrey Ball (*Arthur Lee* and *Gary Yuen* with him) for the applicants/respondents in the appeal.

Sri Ram and *S. Balarajah* for the respondents/appellants.

Cur. Adv. Vult.